Editor's note: 88 I.D. 373

UNITED STATES

v.

DONALD E. FLYNN

AND

HEIRS OF HENRY OROCK, DECEASED

IBLA 79-281 March 18, 1981

Appeal from a decision of Administrative Law Judge E. Kendall Clarke rejecting the Native allotment application of Henry Orock, AA-5841, to the extent that it conflicts with the trade and manufacturing site application of Donald Flynn, AA-4545, and approving the Flynn application.

Affirmed as modified.

1. Alaska: Native Allotments

   An Alaskan Native allotment applicant is required to make satisfactory proof of substantially continuous use and occupancy of the land for a minimum period

of 5 years. Such use and occupancy contemplates substantial actual possession or use of the land, at least potentially exclusive of others, and not merely intermittent use. While qualifying use must be substantially continuous, there is no requirement that the 5-year use be in a consecutive 5-year period.

2. Alaska: Native Allotments -- Alaska: Possessory Rights

The right to a Native allotment vests only upon the completion of 5 years' use or occupancy of land and the filing of an application therefor. Absent the timely filing of an allotment application, where a Native, who has completed the requisite 5 years' use, ceases to use or occupy the land and permits the land to return to an unoccupied state, the right to an allotment of that land also terminates, regardless of the subjective intent of the Native. In a similar fashion, all possessory rights afforded by the Act of May 17, 1884, 23 Stat. 24, 26, and other similar Acts, terminate upon the cessation of actual use or occupancy. Such lands then become open to the initiation of rights by others.

3. Alaska: Native Allotments -- Rules of Practice: Government Contests

The provisions of 25 U.S.C. § 194 (1976) relating to the placing of the burden of proof do not apply where the Government contests the qualifications of an allotment applicant. An allotment applicant in such a situation is the proponent of the rule and must show his or her entitlement to the land sought.

Lucy S. Ahvakana, 3 IBLA 341 (1971), and Wilbur Martin, Sr., A-25862 (May 31, 1950), overruled to extent inconsistent.

APPEARANCES: Joel Bolger, Esq., and David B. Snyder, Esq., Alaska Legal Services Corporation, for the heirs of Henry Orock; Charles Cranston, Esq., Cranston, Waters, Dahl & Jarrell, Anchorage, Alaska, for Donald E. Flynn.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The heirs of Henry Orock appeal from the decision of Administrative Law Judge E. Kendall Clarke rejecting the Native allotment application of Henry Orock, AA-5841, to the extent that it conflicts with the trade and manufacturing site application of Donald E. Flynn, AA-4545, and approving Flynn's application.

On December 4, 1968, Donald Flynn filed a notice of location for a trade and manufacturing site near the Dog Salmon River. Henry Orock filed a Native allotment application on December 22, 1969, for lands which conflicted as to 35 acres with Flynn's site. Orock claimed use since 1945. Following Flynn's filing an application to purchase in January 1972, BLM issued a complaint alleging that Flynn had attempted to appropriate occupied and improved lands claimed by an Alaska Native. That complaint was dismissed on October 27, 1976, and BLM prepared to issue a patent to Flynn. The heirs of Orock filed a complaint with the United States District Court for the District of Alaska seeking to enjoin BLM from issuing a patent to Flynn and requesting that a

patent to the disputed lands be issued to them under the Native Allotment Act. By order dated December 17, 1976, the District Court directed that the Department of the Interior hold a hearing covering all conflicting issues between BLM and the two applications. The hearing was held in King Salmon, Alaska, on October 21 and 22, 1977.

Judge Clarke's decision provides a detailed summary of the testimony and evidence adduced at the hearing, and we set it forth here:

> Gerald Yeiter, a BLM realty specialist and trespass investigator, was called as a witness for the Government. (Tr. 6). He testified he conducted a field investigation of the disputed land on June 11, 1973. A helicopter flight was made over the entire 160 acre allotment. During the flight, Mr. Yeiter saw a small cabin, which was later determined to belong to Donald Flynn, on the site. (Tr. 8). The site is situated on a butte in an area that is very good for hunting and fishing. (Tr. 9).
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> An earlier field report concerning Henry Orock's native allotment (Ex. 9) prepared by William E. Ireland and Mr. Yeiter recommended that the allotment be rejected. (Tr. 11). The report concluded that the applicant, Orock, had abandoned use of his allotment several years prior to the field examination. (Ex. 9). A supplemental investigation on January 20, 1975 and report dated April 2, 1975 was made by Mr. Yeiter. He concluded that "it is likely a cabin could have been there, however, possibly too deteriorated to be recognized." In addition he determined, "If a cabin was there as alleged, it had definitely been abandoned since 1961." (Tr. 13, Ex. 10). Another supplemental report dated February 14, 1977 prepared by Mr. Yeiter reaffirmed his earlier recommendations. (Tr. 14, Ex. 11). In particular the report states:
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> > It is the investigator's opinion that a cabin was constructed in 1942 as Moses Taongnok has stated. The roof had caved in, in 1952 as stated by Tom Riley. Further, that due to age, the cottonwood logs were in an aggressive state of decay and the applicant left the area in 1952 not to return, with no further use of the

> land. The site plus one other which is located approximately four miles up river were abandoned and only utilized in a temporary manner. That the applicant (according to his brother-in-law, Nick Meticgoruk) stated that Orock left Pilot Point in December 1959 because of ill health not to return. It appears to this investigator from the best evidence submitted by Orock in the land in question had been segregated by Flynn's use and occupancy since 1965, which was four years prior to Orock's filing an application for an allotment. . . . Further from the best evidence supplied to this investigator by Henry Orock (sic) heirs there was no real proof that Orock ever occupied and used the land in question as required.

On cross-examination by counsel for Henry Orock, Mr. Yeiter stated in investigating a Native Allotment Application he would attempt to talk to all the people who may have knowledge concerning an applicant's allotment. (Tr. 17). However, he only contacted the people on the Pilot Point and Ugashik village councils during his investigation in 1973. (Tr. 18). The allotment is 11.2 air miles from Pilot Point. (Tr. 18). Mr. Yeiter also had reservations about the BLM's decision to grant 125 acres of land adjacent to the disputed area to the Heirs of Henry Orock. (Tr. 19). When asked what "abandonment" meant to him, Mr. Yeiter explained, ". . . [I]f I went down to the Dog Salmon River, and decided to leave my job and go trapping for a couple months, and cut me a log cabin, and just take off and leave and never return." (Tr. 20).

During a third visit to the allotment, Mr. Yeiter did discover some old logs behind Flynn's cabin. (Tr. 22). He stated these logs could have been overlooked earlier since they were covered with moss and vegetation. (Tr. 23). The logs were ten feet away from Flynn's cabin. Another site was discovered upriver approximately four miles east of the allotment. (Tr. 21). A cabin found on this site is still recognizable. (Ex. 11).

On further questioning by counsel for Mr. Flynn, Mr. Yeiter asserted he has a forestry background that would allow him to determine the age of cottonwood trees. (Tr. 172). A sample of a cottonwood log that was found lying near Flynn's cabin was taken on October 8, 1976. (Ex. H). Mr. Yeiter estimated the log to be over twenty years old and possibly up to thirty years old. (Tr. 175).

Likewise, he determined the log had been on the ground for that amount of time also. (Tr. 176). In his opinion, the logs have been part of a disintegrating cabin for about twenty years.

A field examination report dated October 18, 1976, prepared by Carl F. Ehelebe, a BLM natural resource specialist, confirmed the discovery of deteriorating cottonwood logs that had been part of a small cabin 10 feet away from Flynn's cabin. (Flynn Ex. I). The report concluded it had taken many years for the cottonwood logs to disintegrate into the condition that it was found in. Although the logs could have possibly been part of a cabin that Henry Orock contended was on the allotment, the report opined that the logs are highly unlikely to be the remains of any structure that was alleged to have been standing in 1964. Moreover, since the degree of deterioration is so advanced, it is also unlikely that the logs were part of a cabin that was built in 1947. The logs found were 20 to 30 years old.

Another field examination report also dated October 18, 1976, involving the Dog Salmon River area was introduced into evidence. (Flynn Ex. J). This report also acknowledged there were several cottonwood logs found behind Flynn's cabin. The report stated "[T]he logs were all in an advanced state of decomposition, suggesting that the structure has been collapsed for 10 or more years." Although rusted cans, glass fragments and pieces of decayed roofing paper were found, no personal belongings were uncovered. In addition, this report disclosed there is another structure of more recent construction four miles upstream from Flynn's cabin site. This structure had collapsed at least several years prior to its discovery by the field examiner.

Arthur Condardy, Sr., was called as a witness on behalf of Henry Orock. He has resided in the Pilot Point-Ugashik area for the past fifty years. (Tr. 26). In addition, he has known Henry Orock since he was a "kid." He visited Orock at the cabin on the Dog Salmon River in the late forties and early fifties. The visits were made during the winter when Orock was trapping. The cabin was made out of logs. (Tr. 27). Mr. Condardy estimated Orock trapped near the vicinity of the cabin for 10 years. Orock also hunted for caribou up near the cabin. (Tr. 28). Mr. Condardy testified Orock moved to Anchorage in 1968 or

1969. However, Orock made trips back to the cabin during trapping season. (Tr. 29).

On cross-examination, Mr. Condardy admitted he had stated Orock left for Anchorage in the early 1960's in an affidavit made October 8, 1976. (Ex. A, Tr. 31). The affidavit also stated that Mr. Condardy last saw the cabin standing on the allotment in 1952 or 1953. (Tr. 31). In addition, he asserted Orock would not leave his rifle at the site but would take it with him in the dogsled. (Tr. 33). He has never seen Orock on the allotment after 1960, although Orock was back at Pilot Point constantly during the 1960's. (Tr. 34).

Valentine Supsook, a former resident of Pilot Point, also is acquainted with Henry Orock. He has visited and stayed at Henry Orock's cabin near the Dog Salmon River in the 1950's. (Tr. 40). According to Mr. Supsook, Orock allowed other residents of Pilot Point use of the cabin. Mr. Orock also owned a house in Pilot Point. (Tr. 42). When Mr. Orock became ill, he stopped going up to the cabin. (Tr. 43).

On cross-examination, Mr. Supsook testified the area near Orock's cabin is a customary hunting ground for all of the people in the Pilot Point area. (Tr. 45). However, it is customary that no one goes near another person's trapline. Orock's traplines could have extended for more than five miles. (Tr. 46).

Mary Beth Toms, one of Henry Orock's daughters, testified she recalled her father going trapping in 1956. (Tr. 52). Furthermore, she believes her father went trapping in 1959. (Tr. 53). Mr. Orock would go back and forth to Pilot Point from Anchorage during the 1960's. (Tr. 55). At times he was forced to stay in Anchorage because of his failing health. (Tr. 56). Ms. Toms contended her father always wanted to go back to his land on the Dog Salmon River. (Tr. 56).

Moses R. Taongnok, from Ugashik, testified he helped Henry Orock build his cabin out of cottonwood on the Dog Salmon River. (Tr. 63). When Mr. Taongnok visited the allotment in the 1960's, he found that Mr. Flynn had built a cabin right over the area where Mr. Orock had built his. (Tr. 67). The last time Mr. Taongnok went trapping with Mr. Orock at the allotment was in the 1960's. (Tr. 70). Mr. Taongnok has a cabin eight miles downriver from the disputed site. (Tr. 71).

Mr. Taongnok admitted on cross-examination he did not see Mr. Flynn tear down Mr. Orock's cabin. (Tr. 76). An affidavit signed by Mr. Taongnok indicated he had helped Mr. Orock build the cabin in 1942. Furthermore, Mr. Taongnok stated he did not know when Mr. Orock last used the cabin or land. (Flynn, Ex. B). However, Mr. Taongnok denied that the affidavit accurately states his testimony. He testified he does not know when he last saw the cabin. (Tr. 81).

Martha Lonsdale, another one of Henry Orock's daughters, also testified that her father built a cabin on the Dog Salmon River. (Tr. 84). After Ms. Lonsdale had moved to Anchorage, Mr. Orock would visit her annually. Mr. Orock moved to Anchorage from Pilot Point in 1967. (Tr. 87). Ms. Lonsdale has no knowledge as to whether her father went back to his land on the Dog Salmon River after 1963. (Tr. 88). However, a letter dated November 14, 1965, signed by Henry Orock, stated he was going back to Pilot Point the next day. (Orock Ex. K). She visited the cabin in 1970. (Tr. 92).

During her visit to the allotment in 1970, Ms. Lonsdale discovered that a new cabin had been built near the site of Orock's old cabin. The only evidence of the old cabin were logs that were stacked three or four logs high. (Tr. 94). She also found nets and traps stacked against these old logs. According to Ms. Lonsdale, the traps were old. An old rifle was found hanging on the door of the new cabin. (Tr. 95). She took the rifle in belief that it had belonged to her father. She also returned to the site every year until 1976. In 1971, she found that the remaining portions of the old cabin had been removed and a snowmobile shelter built on that site. (Tr. 96). However some of the old logs still were on the ground near the new cabin. Some of the logs were stacked behind the new cabin. (Tr. 97).

On cross-examination, Ms. Lonsdale maintained the old logs were stacked two and a half feet high when she visited the allotment in 1970. (Tr. 100). She discovered the new cabin had two rooms. The floor in one of the rooms in Flynn's cabin appeared to have been compacted as if someone had walked on it for years. (Tr. 101). She also contended that the new cabin was built over part of the site of the old cabin. (Tr. 103, Ex. D).

Nick Meticgoruk, who has known Henry Orock for many years, testified he visited the Dog Salmon River cabin

site and took photographs of it sometime in the 1950's or later. (Tr. 108, Orock Ex. C, D and E). He did not visit Orock at the cabin site after he took those photos. (Tr. 112). Mr. Meticgoruk is a resident of Pilot Point. He stated that Mr. Orock trapped for furs every year. (Tr. 113). A photograph of Mr. Orock standing in front of a log cabin was introduced into the record. (Ex. C). He also contended that a rifle found during the 1970 inspection he made with Ms. Lonsdale belonged to Henry Orock. (Tr. 114, Orock Ex. N 1-6). In addition, he confirmed Ms. Londale's [sic] contention that the Flynn cabin was built on top of Orock's old cabin. (Tr. 115).

An affidavit signed by Nick Meticgoruk indicated that the photos of the Orock cabin, (Orock Ex. C), were taken in 1949. (Flynn Ex. E). On cross-examination, Mr. Meticgoruk conceded that he took the photos in 1949 (Tr. 120). He also stated that Mr. Orock did not go back to Pilot Point after 1959. (Tr. 121).

Another one of Henry Orock's daughters, Jane Stephenson, was called as a witness. She stated Mr. Orock went trapping near the Dog Salmon River in 1957. (Tr. 126). She also testified that Mr. Orock was forced to go to Anchorage because of his failing health. (Tr. 127). According to Ms. Stephenson, Mr. Orock always intended to go back to the cabin on the Dog Salmon River. (Tr. 128).

Orin D. Sebert was called on behalf of Mr. Flynn. Mr. Sebert is a pilot for Peninsula Airways which is headquartered in Pilot Point and King Salmon. (Tr. 134). He has been flying out of Pilot Point since 1954. In addition, he has resided in Pilot Point since 1949. He flew Mr. Flynn into the Dog Salmon River area on August 8, 1965. (Tr. 136). However, Mr. Sebert did not go up to the cabin site at that time. From the landing site, he could not see the cabin site. (Tr. 137). During a later visit he went up to the cabin. He could not recall observing any remnants of an old cabin near Flynn's cabin. (Tr. 137). Significantly, Mr. Sebert was aware that there was a cabin at the disputed allotment earlier. But, the cabin was no longer there when he took Mr. Flynn there. The old cabin was used up to 1959. (Tr. 138).

Mr. Sebert announced that other people from the Pilot Point area trapped near the Flynn cabin. He contended four

or five other people he knew did. (Tr. 139). Although he lacks any records concerning air travel in 1960, he believed Mr. Orock did not go back to the Dog Salmon River after 1960. (Tr. 140). On the other hand, Mr. Sebert acknowledged that Mr. Orock made visits back to Pilot Point during the 1960's. (Tr. 41). Moreover, Mr. Sebert denies that Mr. Flynn had ever asked him about the prior use of the disputed land in question. (Tr. 142). But upon further questioning, Mr. Sebert changed his testimony and stated, "I think he did, yes." (Tr. 142).

Robert W. Gruber stated he flew Don Flynn into the Dog Salmon River area in June, 1965. During a thirty minute inspection of the area at that time, he did not discover a cabin or any remnants of one. (Tr. 146). However, the inspection was a general one of the area. If the remains of a cabin were hidden under the trees, he would not have seen them. (Tr. 151).

Robert Piatt, a former assistant hunting guide for Mr. Flynn, stated he worked at the Dog Salmon cabin site in 1966. He saw an outline of an old cabin behind Flynn's cabin. The outline was covered with vegetation. (Tr. 153). During the three years that Mr. Piatt was at Flynn's cabin, he saw no one else come up to the area and use it. (Tr. 155). However, he never was at the cabin during the winter months. (Tr. 156). Additionally, he never uncovered any nets or traps near the old cabin. (Tr. 157). Likewise, he never found any part of Flynn's cabin to be constructed from any old cottonwood logs. (Tr. 158).

Roger B. Briggs, a fisherman, from Ugashik, Alaska, testified he visited Flynn's cabin in the fall of 1965. (Tr. 161). At that time the cabin was nearly completed. He was at the site for three hours. However, he did not find any signs of any old cabin. He also insisted that Mr. Flynn's cabin was constructed out of plywood and no part of it used any cottonwood logs. (Tr. 162). He does not know Mr. Orock. (Tr. 163).

Donald Flynn, a guide and commercial fisherman from Homer, Alaska, stated he began conducting guided hunting expeditions in the Dog Salmon River area in 1965. (Tr. 188). Mr. Flynn declared:

> In the -- in the summer and fall of '65. I think the first trip was done with Bob Gruber,

> when I definitely had in mind to find a site for my cabin. We circled the Dog Salmon River area. And I had already established that was an area that I would like. We were looking for a place where we could land safely for a plane operation, and where we could build a dry camp above the swamp. There's quite a bit of swamp in that area. So we stopped at what is now the -- my established camp, where there is a rock ridge that juts out into the river, with tree protection and good possibility of building a permanent area. (Tr. 189).

When asked if he was interested to know if there were any other claims to the site he initially occupied in 1965, Mr. Flynn responded:

> As a guide, I naturally was, because first of all, guides don't encroach upon each other. And secondly, I wouldn't build a camp in a large area where there were possibilities of building other camps, if I knew there would become a conflict later. (Tr. 190).

Mr. Flynn contends he asked Orin Sebert in 1965 if there had been any prior occupancy or use of the disputed land. Mr. Sebert indicated there were no previous occupants but stated other people had trapped there. (Tr. 190). Because Mr. Flynn had no knowledge that anyone also had been on the cabin site and because there was no visible construction of any cabin or other dwelling, he decided to build his cabin there. (Tr. 191). The area was in a complete natural state at that time. Grass had grown to two to three feet in height. (Tr. 192).

In August of 1965, Mr. Flynn began constructing a plywood cabin on the disputed land. (Tr. 192). While building his cabin, Mr. Flynn discovered some old logs ten feet behind his cabin site. (Tr. 193). Ten to twenty logs were scattered on the ground. He also found an old rusted rifle near his cabin. (Tr. 196).

Mr. Flynn denies that any part of his cabin was built with any of the old logs found near his cabin. (Tr. 199). However, he admitted it is possible that he did use some of the old logs to build a ramp to run his snow mobile through. (Tr. 200). The floor of Flynn's cabin is all plywood. (Tr. 203). Mr. Flynn had never heard of

Mr. Orock until he found a native allotment tag on one of his monument stakes in 1971. (Tr. 206).

When Mr. Flynn filed his location notice on December 4, 1968, he was unaware of any native allotment claim to the disputed land. (Tr. 206). He also filed an application to purchase a Trade and Manufacturing Site which corrected the inaccurate description of his earlier location notice. (Tr. 207, Ex. 3). The area has been used in conjunction with Mr. Flynn's hunting operations. (Tr. 207). However, several trappers have been using Flynn's cabin during the winter months. (Tr. 208). Several traps were found near Flynn's cabin several times. (Tr. 208). He also is aware that the area has been used for trapping in the past. In 1973, there appeared to be evidence of someone using a net to fish in the river. (Tr. 212).

Mr. Flynn believes there are no other available sites to conduct his hunting trips outside of the site he currently claims. (Tr. 213). He denied ever tearing down any cabin or destroying any signs of one. (Tr. 214).

On cross-examination, Mr. Flynn stated he talked to Moses Taongnok about the disputed land once but he did not consult with any other person from the area. (Tr. 223). When Mr. Flynn completed the 1972 application for a Trade and Manufacturing Site, he thought the questions on the form related back to his earlier 1968 location notice. (Tr. 227). In particular, he thought that the question asking if the disputed land had any other claims to it referred to the events arising in 1968 and not subsequently. (Tr. 227).

In rebuttal, Alec Gretchen, an air taxi operator from Pilot Point was called in behalf of the heirs of Henry Orock. (Tr. 230). Mr. Gretchen has known Henry Orock for a long period of time. In 1948, Mr. Gretchen flew Orock up to the Dog Salmon River to trap and hunt. Mr. Orock did not have a cabin there at that time. (Tr. 231). Over a span of ten years, Mr. Gretchen took Orock up to the Dog Salmon River a dozen times. Mr. Gretchen learned there was a cabin there in the mid-1960's. (Tr. 232). He saw a cabin there but cannot recall when. The last time Mr. Gretchen saw Orock was in 1970 at Pilot Point. (Tr. 234). Mr. Gretchen denies Mr. Flynn ever asked him about Mr. Orock. (Tr. 235).

Moses Taongnok contended that bears had gotten into Orock's cabin and had torn down several of the walls. (Tr. 238). Subsequently, he examined the cabin in 1964. It was still standing then. (Tr. 241). However, in an earlier affidavit, Mr. Taongnok admitted he did not know whether he inspected the allotment in 1964. (Flynn Ex. B).

The deposition of Robert L. Haynes was introduced into the record in behalf of Donald Flynn. Mr. Haynes is a commercial fisherman from Homer, Alaska. (Depo. 2). He has known Mr. Flynn since 1968. (Depo. 3). In July of 1970, he accompanied Mr. Flynn on a visit to the cabin site on the Dog Salmon River. (Depo. 5). Mr. Haynes found a two-room plywood cabin there but found no other cabin. However, he did find several rotted old cottonwood logs on the ground next to Flynn's cabin. The logs possibly could have been part of a corner of an old cabin. (Depo. 7). He estimated the logs were ten years old. (Depo. 8).

Over the next three years, Mr. Haynes was Mr. Flynn's assistant guide. During this time, Mr. Haynes made annual trips to the cabin site. (Depo. 10). The cabin remained in the same condition during that time. (Depo. 10). Significantly, Mr. Haynes has never heard of any claims to the disputed land by Mr. Orock. (Depo. 12).

On cross examination, Mr. Haynes deposed he had initially heard about the conflicting claim to the land in 1975. (Depo. 15). Mr. Flynn had mentioned that there appeared to be signs of an old fallen down cabin on the Dog Salmon site. In addition, Mr. Flynn choose [sic] the Dog Salmon site because it was the first good shelter near available timber under a rock cliff. (Depo. 20). Mr. Haynes declared he did not find any hunting or trapping equipment near the old logs. (Depo. 25).

In his decision, Judge Clarke made various rulings. First, he applied the Federal common law of "abandonment" and held that the record did not establish that Orock intended to abandon his claim (Decision at 12-13). Second, he held that the heirs of Orock had failed to submit satisfactory proof of a substantial continuous use and occupancy of the land for a period of 5 years. Judge Clarke stated:

> Although the record is replete with testimony alleging Orock has trapped in the Dog Salmon area since 1948, there is no clear and credible evidence that Orock trapped and used the allotment site for a 5-year period. I find the testimony of Nick Meticgoruk vague and imprecise. Even though he contends Orock trapped every year, he fails to indicate where and when Orock did so. Arthur Condardy merely estimated that Orock trapped in the vicinity for ten years during the late 1940's and early 1950's. (Tr. 28). He gave no specific dates when he saw Orock use the cabin or trapped near it. The most favorable view of Orock's evidence reveals use only for a period of four years from 1956-1959. (Tr. 52, 59, 126). Consequently, this period of use will not support a finding of substantial continuous use and occupancy of the allotment for a period of five years. 43 CFR § 2561.2(a).

(Decision at 13).

Third, Judge Clarke held that appellants had failed to prove that Orock ever had "substantial actual possession and use of a cabin" near the site of Flynn's cabin. Noting that this Board had held in a number of prior cases that a long period of nonuse vitiates the effectiveness of any prior use, the Judge held that, as the record disclosed no use of the cabin after 1960, this period of nonuse would vitiate any prior qualifying use (Decision at 14). Judge Clarke accordingly found that no preference right had been vested in appellant with respect to the land embraced by the trade and manufacturing site application.

With respect to Flynn's trade and manufacturing site, Judge Clarke expressly found that Flynn had no knowledge of any prior occupancy when

he initiated the claim and found, therefore, that his trade and manufacturing site should be approved (Decision at 14-15).

In their statement of reasons, appellants argue that Orock did satisfy the use and occupancy requirements of the Native Allotment Act of 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed subject to pending applications, section 18a, Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976)). Appellants assert first that the requirement that 5 years' use and occupancy be shown applies only to land within a national forest. We have previously rejected that argument. Jack Gosuk, 22 IBLA 392 (1975); Heldina Eluska, 21 IBLA 292 (1975). Appellants then contend, nevertheless, that the 5-year requirement has been met. They argue that Judge Clarke did not correctly apply the standards for use and occupancy found in 43 CFR 2561.0-5(a) and urge that a more favorable application of the regulation be made. They invoke the "often repeated canon of construction that Federal statutes relating to Indian Affairs should be liberally construed to give maximum benefit to Indians." In addition, they assert that 25 U.S.C. § 194 (1976) requires that the burden of proof be placed on Flynn to establish that Orock did not occupy the land for the required 5 years.

[1] The first question which we must examine is whether appellants showed that Orock had used the land in such a manner and for a sufficient period of time so as to establish use, qualifying under the Native Allotment Act, supra.

Judge Clarke's decision was premised on a finding that appellants had not clearly established a continuous 5-year period of use and occupancy by Orock. Appellants object specifically to this finding. Our review of the record supports appellants' contention that Judge Clarke erred in his ruling on this question.

In the first place, this Board has never ruled that all 5 years of the use and occupancy contemplated by the regulations must be consecutive. Indeed, such a construction could lead to the rejection of an application where a Native had lived on the land 16 out of 20 years, but had been required, for various reasons, to be absent every fifth year. The concept of "substantially continuous" use is one seen best at extreme points. Thus, no one would contend that a use of 2 years followed by the passage of 10 years of no use and then followed by a 3-year period of use would constitute substantially continuous use. On the other hand, our first hypothetical of 16 years' use in a 20-year period does evince such substantially continuous use. No one would really contend that this latter situation merely established "intermittent" use.

Moreover, there was more than sufficient testimony to establish that 5 years' consecutive use had, in fact, occurred. There was uncontradicted testimony that Orock trapped in the area for over 10 years (Tr. 26-27, 40-42, 232). Given the existence of a cabin on the site (a matter to which we will turn infra) it seems safe to assume that

Orock would have made use of the same during the period in which he was trapping.

As to whether or not Orock's cabin was actually located within the land embraced by Flynn's trade and manufacturing site application, we must agree with appellants that the evidence is overwhelming that Orock's cabin was located at one time within the boundaries of Flynn's site. In actuality, however, Judge Clarke's decision was not premised on a view that the situs of Orock's cabin was someplace other than Flynn's site; rather, his ruling was clearly predicated on his belief that the subsequent nonuse of the site vitiated the prior use.

[2] Examination of the question of what period of nonuse is sufficient to render nugatory prior qualifying use requires a detailed analysis of both the history of the Native Allotment Act and subsequent Departmental proceedings. At the outset we note that all parties apparently proceeded upon the assumption that upon completion of 5 years' use and occupancy a preference right would vest in the Native occupant. This is not correct, as we will explain more fully below. Initially, however, it is crucial to distinguish between two separate types of uses which gave rise to different types of Native rights.

The first source of Native rights arose from section 8 of the Act of May 17, 1884, 23 Stat. 26, which provided that Alaska Natives "shall not be disturbed in the possession of any lands actually in their use

and occupation or now claimed by them." 1/ This provision accorded no permanent rights in the lands to the Natives, being only designed to protect their occupancy until such time as Congress should act further on the question of title to such lands. 2/ See Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278 (1955). Moreover, the right of occupancy was deemed to provide no rights as against the United States. See United States v. Atlantic Richfield Co., supra at 1029-31; Alaska Commercial Company, 39 L.D. 597 (1911). See also Edwardsen v. Morton, 369 F. Supp. 1359, 1370 (D.D.C. 1973).

In order to more fully protect the rights of Alaska Natives, Congress adopted the Act of May 17, 1906, 34 Stat. 197, originally 43 U.S.C. §§ 270-1 to 270-3 (1970), generally referred to as the Native Allotment Act. That Act provided, in essence, for the allotment of up to 160 acres of land and granted a preference right as to such lands as were actually occupied by the Native. 3/ Thus, under the original

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1/ Of similar purport was section 27 of the Act of June 6, 1900, 31 Stat. 321, 330.

2/ Section 8 of the Act of May 17, 1884, supra, was construed to apply only to lands occupied as of the date of that Act, and was not applicable to lands subsequently occupied. See Heckman v. Sutter, 119 F. 83 (9th Cir. 1902); contra, Young v. Goldsteen, 97 F. 303, 308 (D. Alaska 1899) (All persons had a right to expect protection from Congress if they were first to go upon the public domain and occupy and improve the same, even though they went there after May 17, 1884.)

However, as various public land laws were made applicable to Alaska, most notably the Act of March 3, 1891, which provided for trade and manufacturing sites, these Acts expressly excepted lands then occupied by Natives. See section 14, Act of March 3, 1891, 26 Stat. 1095, 1100. Thus, most entries under the public land laws required that the land not be used or occupied by Natives as of the time of the entry or application. See United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1014-15 (D. Alaska 1977), aff'd, 612 F.2d 1133 (9th Cir. 1980).

3/ The General Allotment Act, Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §§ 331-349 (1976), was originally deemed not to apply to Alaska since the native inhabitants were not officially classified as

Act, occupancy was only required in order to gain a preference right. See generally Acquisition of Title to Public Lands in the Territory of Alaska, 50 L.D. 27, 48-49 (1923). By Departmental decision, however, allotments within national forests could only be granted where they were based on occupancy prior to the establishment of the forest or alternatively, where the land was classified by the Secretary of Agriculture, under 43 U.S.C. § 270-2 (1970), as agricultural. See Shields v. United States, No. A 77-66 Civil (D. Alaska, Jan. 9, 1981); Louis P. Simpson, 20 IBLA 387 (1975); Yakutat and Southern Railway v. Harry, 48 L.D. 362 (1921). As early as 1935, however, the Department required 5 years' use and occupancy prior to the issuance of any allotment certificate. See Allotments of Public Lands in Alaska to Indians and Eskimos, 55 I.D. 282, 285 (1935). By the Act of August 2, 1956, 70 Stat. 954, Congress amended the Native Allotment Act to expressly require 5 years' use and occupancy as a prerequisite to the grant of any allotment, thereby ratifying the earlier Departmental regulations. See Medina Flynn, 23 IBLA 288 (1976); Heldina Eluska, supra at 294 (1975); Terza Hopson, 3 IBLA 134, 144 n.5 (1971).

There are certain critical differences between these two separate sources of Native rights. Thus, the right of occupancy protected under

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fn. 3 (continued)
"Indians" until the Indian Reorganization Act of 1934, Act of June 18, 1934, 48 Stat. 984, 988, 25 U.S.C. § 479 (1976). See, e.g., John Brady, 19 L.D. 323 (1894). But see Nagle v. United States, 191 F. 141 (9th Cir. 1911); Status of Alaskan Natives, 53 I.D. 593 (1932).

the Act of May 17, 1884, supra, and subsequent such Acts, extended to lands used communally, as well as individually, and was possessed of no gross acreage restriction. The right to an allotment, however, was limited by regulation since 1935 and by statute since 1956, to lands used by an individual Native by himself or in conjunction with his dependents and was limited to a total of 160 acres. 4/ What was not different, however, was the nature of the use involved. Though phrased in differing parlance, the type of appropriation contemplated under both statutes was the same. Thus, permissive Native occupation under the various Acts was required to be "notorious, exclusive and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another, and the apparent extent thereof must be reasonably apparent." United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841, 844 (D. Alaska 1948). See also United States v. State of Alaska, 201 F. Supp. 796 (D. Alaska 1962); Kittie Cleogeuh, 28 L.D. 427 (1899); A. S. Wadleigh, 13 L.D. 120 (1891).

In the area of Native allotments, while it has been recognized that occupancy or use must only be "substantially continuous" (see Frank St. Clair, 52 L.D. 597 (1929), on petition, 53 I.D. 194 (1930)),

4/ Initially, the Department also required that the allotment be of one contiguous tract of land. See Solicitor's Opinion, M-36352 (June 27, 1956). This holding was subsequently reversed in Allotment of Land to Alaska Natives, 71 I.D. 340 (1964), on the basis that it failed to take into consideration the seasonality of use customary to the Native way of life.

such occupancy or use must, at a minimum, be "potentially" exclusive. See 43 CFR 2561.0-5(a). In Herbert H. Hilscher, 67 I.D. 410 (1960), the Department was faced with both the question of "occupancy" sufficient to establish a preference right under the Native Allotment Act and the existence of "occupancy" sufficient to serve as a bar to the initiation of rights by non-Natives. Appellants have focused on the following sentence in that decision. "In the instant case, the preference right for an allotment resulting from occupancy on a portion of this tract by Mrs. Smith's [the Native allotment applicant] family was presumably extinguished when, sometime between 1938 and 1944, the family left the tract with the intention of permanently residing elsewhere." (Emphasis supplied.) Id. at 415. Appellants argue that Hilscher stands for the proposition that an allotment can be abandoned only under traditional common law principles which require an "intent" to abandon. Read in its entirety, however, Hilscher does not support the argument appellants advance.

The Hilscher case involved conflicting applications: The first was filed by Herbert H. Hilscher on June 1, 1954, for a soldiers' additional homestead entry, and the second was filed by Maria M. Smith on May 24, 1956, seeking a Native allotment of the same land. Hilscher contended that at the time he had made application for the land he had examined the land and found no traces of present or recent habitation on any portion and no evidence of occupancy or use, though there were certain "old ruins" on property immediately adjacent. Further, he stated that he had been informed that no one had lived on the land for at least 15 years.

On the other hand, it was uncontested that Smith's father, Skar Stevens, had lived on the land from 1906-1910 until sometime between 1938 and 1944 "when he moved elsewhere permanently." The decision noted, however, that

> it appears that when the [Hilscher's] application was filed no one had lived on the tract for approximately 10 years, the only evidence of former occupancy being fallen timber crossbars and pieces of roofing from cabins, rusty tins and similar debris in several places on the ground overgrown with brush.

Id. at 412-13. Smith also stated that she had stored a boat on a beach area bordering the tract since 1950.

The Acting Director, BLM, rejected Hilscher's application not because of the preference right of Smith, but because the tract of land was "claimed" by a Native and thus unavailable for entry under the soldiers' additional homestead regulations, citing 43 CFR 61.7 (1954). 5/ In Hilscher, Solicitor Stevens initially noted that there was nothing either in regulation or statute which required rejection of an entry because the land applied for is "claimed" by a Native. Cf. United States v. 10.95 Acres of Land in Juneau, supra at 844. Rather, the regulations merely required appellant to state whether or not the land was claimed. Inasmuch as the Smith allotment application was not filed

5/ While this specific regulation no longer exists, its provisions are replicated, in relevant part, in 43 CFR 2562.3(d)(2) (trade and manufacturing sites), and 43 CFR 2563.1-1(a)(6) (homesites and headquarters).

until almost 2 years after Hilscher's application, failure to identify the allotment claim could not serve as a predicate for rejection of Hilscher's application.

Solicitor Stevens then turned to the related question of the existence of a preference right in Smith or, failing that, the existence of a Native occupancy right such as would defeat Hilscher's application. 6/ With reference to Smith's asserted preference right to an allotment, the Solicitor made the statement, set forth supra, that Smith's preference right was "presumably extinguished when, sometime between 1938 and 1944, the family left the tract with the intention of permanently residing elsewhere." (Emphasis supplied.) 67 I.D. at 415. Two points must be raised concerning this statement. First, though the statement expressly notes the existence of an "intention" to reside elsewhere, there is nothing in the decision which would provide a basis for the conclusion that Skar Stevens "intended" to abandon the land. Rather, the original statement, set forth at 67 I.D. 412, merely notes that Skar Stevens lived on the land until 1938 to 1944 "when he moved elsewhere permanently." This was not a statement of his intent but was rather one of fact. The subsequent reference to "intention" appears to be a conclusion derived from the fact of Skar Stevens' actions, not an observation of his state of mind.

6/ As this Board has had occasion to recognize, situations may arise, such as in communal use, where an individual Native allotment applicant would be unable to qualify for an allotment but such use as was shown would prohibit other forms of disposition. See Lucy S. Ahvakana, 3 IBLA 341, 343 (1971).

Second, and more importantly, this statement must be read in conjunction with the two succeeding paragraphs of the decision. Thus, Solicitor Stevens noted that there was no reason to construe the occupancy contemplated by the Native allotment preference provisions any differently from the occupancy of the Natives which prevented subsequent disposals of land to third parties. Solicitor Stevens then stated:

> Occupancy implies some substantial actual possession and use of land, at least potentially exclusive of others, such as necessarily results from residence on or cultivation of land. Such slight and sporadic use of land as shown by the allotment applicant's storing a boat thereon is neither exclusive nor substantial, and, by itself, amounts to actual occupancy of no larger an area than is required for depositing a boat (about 15 feet long) on the ground. In the instant case there is evidence that no one has resided on the land for many years and that only a small area along the beach on this tract has been even casually used or occupied for at least 15 years. This evidence will not support a conclusion that in 1954 the tract was occupied, within the meaning of the provisions here relevant, either by the Indian families who formerly resided on it, or by Mrs. Smith, with the exception of that small area on the beach on which she allegedly stored her boat since approximately 1948. Consequently, to the extent that the decisions of the Acting Director and the manager held that the appellant's application must be rejected because the tract was occupied by an Alaskan Indian or natives, the decisions were erroneous. [Emphasis supplied.]

Id. at 416 (footnote omitted). 7/

7/ We would note that to the extent that Hilscher indicated that residence and cultivation were prerequisites to use and occupancy, its scope was restricted by a subsequent Solicitor's opinion which noted that in determining use and occupancy reference must be made "to the natives' mode of life and the climate and character of the land." Allotment of Land to Alaska Natives, supra at 359. This latter opinion, however, expressly noted that the requirement of substantial actual possession and use of land, at least potentially exclusive of others "had received judicial approbation." Id. at 358.

We wish to emphasize particularly that Solicitor Stevens' reference to use and occupancy applies equally to use and occupancy under the Native Allotment Act, as well as to occupancy contemplated by the Act of 1884 and its progeny. Support for this construction is readily seen by comparing early Departmental decisions involving Native allotment preference applications (see, e.g., Frank St. Clair (On Petition), supra; Yakutat and Southern Ry. v. Harry, supra), with those relating to the occupancy protection afforded under the 1884 Act (see, e.g., Point Roberts Canning Co., 26 L.D. 517 (1898); Fort Alexander Fishing Station, 23 L.D. 335 (1896); A. S. Wadleigh, supra). Thus, the preference right of allotment attached only to the lands occupied or used (Frank St. Clair (On Petition), supra), just as the 1884 Act extended only to lands presently under "actual occupation or use." Naval Reservation, 25 L.D. 212 (1897); A. S. Wadleigh, supra.

It is equally clear that a cessation of occupancy could nullify rights acquired by prior occupancy under the 1884 Act. Thus, in Carroll v. Price, 81 F. 137 (D. Alaska 1896), Judge Delaney charged the jury, in part, as follows:

> A possessory right acquired in public lands may be lost by abandonment, and where a party, having once acquired this right, surrenders his claim, goes off the ground, or gives up his possession in the sense of abandoning his right, the piece of land becomes restored to its original status in the public domain, and is subject to occupation and possession by any other citizen. But if the original occupant, after such abandonment takes place, and before any other person acquires any rights thereon, goes back on the

> ground, reassumes possession, makes additional improvements, his right to the piece of land becomes restored, and the tract is again segregated from the public domain to such a degree as to enable him to hold it against anybody except the United States. There is some evidence in this case tending to show that the possession and occupancy of the plaintiff and his grantors were not continuous from 1881, but although such possession may have been interrupted, if you find that it was resumed prior to the location and occupancy claimed by the defendants, then the plaintiff has the better right. [Emphasis supplied.]

Id. at 140-41. While Judge Delaney's charge employs the term "abandonment" it is contextually clear that this "abandonment" was not dependent upon a subject state of mind, but rather related to physical acts in relation to the land.

Under the original instruction for processing Native allotments, published on February 11, 1907, 35 L.D. 437, it is clear that occupancy to the date of application was a prerequisite for the assertion of a preference right to an allotment. The instructions included a requirement that the allotment applicant provide an affidavit which "must be sworn to by the person applying, and if claiming under the preference right clause the date of the beginning of his occupancy must be given, and its continuous nature." 35 L.D. at 437. This requirement is clearly reflected in the affidavit form which accompanied the instructions. The preference allotment applicant was required to swear, in relevant part, "that I have occupied the land so applied for since ___." Id. at 439. It is clear that the exercise of the preference right was preconditioned on present occupancy or use as of the time of application.

With this in mind, we return to our original statement that completion of 5 years' use or occupancy did not vest a mere preference right to an allotment. Rather, it was only by application, together with the requisite use or occupancy, that the inchoate preference right matured into a vested right. The preference right was not an in praesenti grant of land. 8/ On the contrary, it required clear identification of the land sought by an applicant before it could be exercised. Indeed, the system of allotment could proceed on no other basis. A Native could clearly use or occupy in excess of 160 acres in a manner consonant with the Native Allotment Act. Prior to his or her application, the Native's use and occupancy would be protected against outside encroachments, save for that by the United States. By application, however, the Native would receive a preference right to an allotment of up to 160 acres. See Arthur R. Martin, 41 IBLA 224 (1979); cf. Florence May Ree, 17 L.D. 142 (1893) (application for allotment under General Allotment Act, Act of February 8, 1887, 24 Stat. 388, may be confirmed to heirs). Death of a Native, invested with an inchoate right to apply for an allotment, but who had not applied in his or her lifetime, terminated the inchoate right and no allotment could be predicated based on such Native's use or occupancy. Louis P. Simpson, supra at 391-92; Larry W. Dirks, 14 IBLA 401, 403-04 (1974).

8/ See generally New York Indians v. United States, 170 U.S. 1, 15-24 (1898). In New York Indians, supra, inasmuch as the Supreme Court found that the Treaty of Buffalo Creek did constitute an in praesenti grant of specific land, the Court examined whether subsequent actions constituted an "abandonment" as known in common law.

It is recognized that "abandonment" as used in legal terminology requires not only a relinquishment of occupancy or a failure to proceed with a claim, but also an intent to abandon. New York Indians v. United States, supra at 35; United States v. Wheeler, 161 F. Supp. 193, 198 (W.D. Ark. 1958). We think Judge Clarke was clearly correct in finding that there was no "abandonment" of the claim within the context of Federal law. The problem, however, is that the concept of "abandonment" is simply not applicable to the facts of this case.

What is involved herein is not an abandonment of a claim, but the cessation of use and occupancy. At the time Orock ceased returning to his cabin he had no "claim" to the land since he had not filed an application for an allotment. When an application was filed in 1969, the evidence clearly indicates Orock had not been using the land for at least 9 years. Until 1969, therefore, there was simply no "claim" which Orock could abandon. In contradistinction, had Orock filed his application in 1959, having at that time completed 5 years' use or occupancy, and then removed himself, for whatever reason, from the land, the question of "abandonment" would properly be raised, and proof of his subjective intent to abandon would be prerequisite to nullifying his claim. Moreover, had Orock filed his application in 1959, or at any time prior to Flynn's settlement, that would have segregated the land in his favor, pending adjudication. 43 CFR 2561.1(e); Evelyn Alexander, 45 IBLA 28, 35 (1980). Absent an application, however, removal from land once occupied does not implicate legal concepts of "abandonment."

Indeed, any other system of analysis would create insurmountable problems in administering the public land laws in the State of Alaska. Inasmuch as Alaska was expressly excepted from the purview of the Taylor Grazing Act (section 1, Act of June 28, 1934, 48 Stat. 1269, 43 U.S.C. § 315 (1976)), land claims in Alaska have continued to be capable of initiation by settlement, Vernard E. Jones, 76 I.D. 133 (1969). 9/ It was not until the Act of April 29, 1950, 64 Stat. 94, 95, 43 U.S.C. § 687a-1 (1976), that settlers initiating occupancy claims in Alaska were required, in all cases, to notify BLM of the initiation of their claim within 90 days of establishing settlement. Failure to so notify BLM did not, ipso facto, nullify the claim, but it did prevent the settler from obtaining any credit for such occupancy as occurred prior to the filing of a notice of the claim or application to purchase. 10/

To the extent that prior use and occupancy by Natives, and other settlers at least until 1950, afforded specific protections absent any application to acquire title, it was essential that acts of appropriation occur which would disclose to an observer on the ground that the

9/ Pursuant to section 1 of the Taylor Grazing Act, all vacant public lands, with certain exceptions, were withdrawn from entry, selection, and location under the nonmineral land laws by various Executive orders. Under section 7 of the Taylor Grazing Act, the Secretary of the Interior has the authority to classify and open lands to entry. Absent such classification, however, no such entry can be permitted.

10/ The mere filing of a notice of occupancy of land for a trade and manufacturing or homesite vested no rights absent occupancy. See Peter Pan Seafoods, Inc. v. Schimmel, 72 I.D. 242 (1965). Moreover, under the provisions of the Act of April 29, 1950, supra, mere occupancy of a settlement claim, absent the timely filing of a notice of location or an application to purchase, afforded the occupant no rights such as would prevent a withdrawal from attaching. See Kennecott Copper Co., 8 IBLA 21, 79 I.D. 636 (1972).

land was under active development or use. Sandra L. Lough, 25 IBLA 96, 105 (1976), and cases cited. 11/ Such occupancy or use would serve as notice to all subsequent persons that the land was under appropriation and thus not available for the initiation of other claims.

Thus, requiring that the occupancy or use be of a continuous nature was essential to the entire structure of Alaskan settlement claims, for the only notice to the world of prior occupation or use would be present occupation or use. In the instant case, the evidence indicates, and Judge Clarke so found, that there was no standing or visible cabin on the site when Flynn initially occupied the land in 1965, nor were there signs of prior use (Decision at 14). No application for an allotment had yet been filed by Orock. Judge Clarke found that Orock did not use the land after 1960, and specifically found that Flynn did not have knowledge of prior occupancy or use of the claim. To require Flynn to somehow become aware of the existence of a prior claim which is neither evidenced on the land nor noticed in the BLM records, at the peril that at some future point in time, his own claim would be subject to invalidation, would enforce a standard of omniscience

11/ While these cases arose under the trade and manufacturing and homesite laws, the animating concept applies with equal, if not greater, force to Native use and occupancy. Inasmuch as the Act of April 29, 1950, supra, did not affect either permissive occupancy of Natives under the 1884 and subsequent Acts, or occupancy with a view towards acquiring an allotment under the 1906 Act, the only possible way for any individual to be put on notice that the land was used or occupied by a Native would be through physical evidence on the land that it was under the prior appropriation of another.

totally inconsistent with the entire history of land law adjudication in Alaska. See Evelyn Alexander, supra. 12/

We hold, therefore, that absent the filing of an application for allotment, cessation of use or occupancy for a period of time sufficient to remove any evidence of a present use, occupancy or claim to the land, terminated all protected rights under both the allotment and permissive occupancy statutes and restored the land to its original status of vacant and unappropriated land, regardless of the existence of any "intent" to permanently abandon such use or occupancy. 13/ Such prior use or occupancy does not serve as a bar for the initiation of rights in the lands by other individuals.

12/ We are fully cognizant that Flynn, by failing to provide notice of his settlement within 90 days, lost credit for all prior use and occupancy, under the Act of April 29, 1950, supra. Thus, had the land which he used been included in a withdrawal prior to the filing of his notice of location in December 1968, the land occupied would have been subject to the withdrawal and that would preclude recognition of any right in Flynn. See Edwin William Seiler, 16 IBLA 352 (1974); Kennecott Copper Co., supra. This was a risk to which Flynn subjected himself by failing to notice his settlement pursuant to Act of April 29, 1950, supra. Moreover, had a Native allotment application been filed prior to the filing of Flynn's notice of settlement, Flynn's right to the land would have been defeated by the segregative effect which occurred upon the filing of an acceptable application, unless he could subsequently show that the allotment applicant had "permanently abandoned occupancy of the land." 43 CFR 2212.9-1(g) (1967). In the instant case, however, Flynn's notice of location preceded Orock's allotment application by almost a year, and thus, the dangers to which Flynn had subjected himself by failing to timely notice his occupancy did not come to fruition.

13/ We would make one final point on this matter. The regulations permit the performance of the requisite use and occupancy within 6 years after the filing of an application. See 43 CFR 2561.2. But the regulations also require that the Bureau of Indian Affairs certify "that the applicant has occupied and posted the lands as stated in the application." (Emphasis supplied.) 43 CFR 2561.1(d). Thus, the present regulations, while recognizing that absolutely consecutive use need not ensue to warrant the granting of an allotment, clearly presuppose the existence of "present" use.

In the context of the present case, we hold that Orock's cessation of use and occupancy in 1960 and the subsequent, if not coterminous disintegration of the cabin on the site, terminated such inchoate rights to an allotment of which Orock may have been possessed, and rendered the land subject to the initiation of rights by Flynn.

Nothing in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), militates against this view. By its nature, the Pence litigation involved Native allotment applicants. The decision noted that an applicant who meets the statutory requirements is entitled to an allotment which may not be arbitrarily denied. 529 F.2d at 141-42. Thus, to the extent that applicants allege compliance with the statutory mandate they are entitled to notice and an opportunity for hearing on disputed issues of fact prior to rejection of their applications. See Donald Peters, 26 IBLA 235, 241-42, 83 I.D. 308 (1976), reaff'd, Donald Peters (On Reconsideration), 28 IBLA 153, 83 I.D. 564 (1976). The Pence case, however, did not purport to examine substantive questions concerning the nature of qualifying use and occupancy.

In the instant case, a hearing, as directed by the District Court, has been held. The full due process rights mandated by the Ninth Circuit have been afforded appellants. All sides have had full opportunity to be heard and the dictates of the Pence case have been observed.

There are two Departmental cases which arguably conflict with our above analysis. The first is Wilbur Martin, Sr., A-25862 (May 31, 1950).

Appellant, a Klamath Indian, had purchased a prior homestead entry of one Arthur Bell in 1922 and moved onto the land, subsequently building a house, woodshed, barn, and smokehouse. Martin resided on the land with his family, from 1923 to 1928. After 1928, the opinion notes "Mr. Martin lived in logging camps, as he was working in the timber industry because of his inability to make a living on his homestead, but he never had any intention of abandoning his settlement." The land embraced in his settlement was withdrawn in 1934, but Martin did not apply for an allotment under section 4 of the Act of February 28, 1891, 26 Stat. 795, 25 U.S.C. § 336 (1976), until 1946. Examining, inter alia, the question whether by absenting himself from the land from 1928 until the time of application in 1946 Martin had forfeited his right to an allotment, Solicitor White stated:

> It is to be noted, in this connection, that there is no requirement in the controlling statute or in the regulations quoted above that after a legal right to an allotment has been acquired, residence must be continuously maintained on the land up to the time of the filing of an application for the allotment. In view of the statements made by the Acting Area Director of the Bureau of Indian Affairs, upon the basis of a thorough investigation, that Mr. Martin left the land (after maintaining his residence there for six years) only because of economic necessity, that he never intended to abandon his settlement, and that he asked the Bureau in 1940, reasonably soon after the establishment of a branch office in his locality, for assistance in getting a patent to the land, and in view of the flexibility which is permissible under the pertinent statutory provision and departmental regulations in making determinations respecting Indian settlement cases of this sort, I have reached the conclusion that Mr. Martin did not lose his right to an allotment of the land because of his long absence from the land and his delay in filing an application for the allotment. [Emphasis supplied.]

While this opinion apparently holds that once residency has been established, the right to an allotment vests, regardless of subsequent acts of the applicant (absent an intent to abandon), the fact situation which is described in the decision is not clear. Thus, though it seems likely that the structures constructed during Martin's residency remained intact, the opinion is silent on this question. Similarly, while the opinion implies that Martin's family remained on the lands sought from 1928 to 1946, this crucial fact is not really stated. Moreover, the decision is related only to Martin's actual residency and does not discuss whether, regardless of where he was actually living, the land was still under his use.

The second case which appears to conflict with our analysis herein is this Board's decision in Lucy S. Ahvakana, supra. Ahvakana involved a conflict between a State selection filed by the State of Alaska in 1964, and a subsequent Native allotment application by Ahvakana, filed in 1968. Ahvakana alleged that she had established occupancy on the land at various intervals between 1929 and 1945, and that various improvements, consisting of a two-room house with storm porch and a two-room store building with storm porch had been placed on the land, presumably at that time. The Fairbanks District Office, BLM, rejected the Ahvakana application, but the BLM Office of Appeals and Hearings vacated that decision and remanded the case for investigation of Ahvakana's allegations. The State of Alaska thereupon appealed to the Secretary.

The Board, in Lucy S. Ahvakana, supra, affirmed the decision of the BLM Office of Appeals and Hearings. The Board first noted that "even if the Indian allotment application is not found to be allowable, the Indian use of the land may be sufficient to bar the state selection application pro tanto." 3 IBLA at 344. The opinion then went on to say:

> If in fact, it is ultimately determined from the investigation that the native has established substantial occupancy prior to the time of the state selection, the land was not vacant and unappropriated and, therefore, not properly subject to a state selection. As to the charge of abandonment, whether a native has permanently abandoned occupancy of claimed land to the extent that he has forfeited any claim he may have established under the Native Allotment Act, depends upon his reason for leaving the land and the interest and relationship he thereafter maintained with the land. See Wilbur Martin, Sr., A-25862 (May 31, 1950). Here again, a native's intent in such a matter can only be determined after a thorough investigation of the facts. If, however, no positive proof is developed which establishes substantial continuous occupancy for a five-year period prior to the state selection or it is clear that the native had abandoned the land prior to the selection, the allotment will not be allowed and the application will be rejected. [Emphasis supplied.]

Id. at 345. These two cases, thus, can arguably be said to represent a view contrary to that set forth in our analysis. It is interesting, however, that Ahvakana cited only Martin as support for its proposition and Martin cited no authority whatsoever. In view of all we have said above, we cannot find that Ahvakana or Martin, to the extent that they hold that upon completion of 5 years' use or occupancy, the right to an allotment vests so that only a legal abandonment can defeat such a right, correctly reflect the law. Accordingly, we hereby expressly

overrule Lucy S. Ahvakana, supra, and Wilbur Martin, Sr., supra, to the extent that they are inconsistent with the views expressed herein. 14/

[3] We now turn to appellants' remaining argument. Appellants' application of 25 U.S.C. § 194 (1976) is misplaced in this case. Section 194 reads:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

14/ We also note that in the early case of Burr v. House, 3 Alaska 641 (1909), Judge Overfield stated that "abandonment of possessory rights upon the public domain is a question of fact, as well as intent." Id. at 643. In that case, however, Judge Overfield found that

"there was sufficient notice given the defendant House, by the physical condition of the lot in question on June 8th, to have put him on his guard that it was claimed by others, and in their occupation and use. In addition to such physical evidence as plainly showed the segregation of this lot from the public domain, there were admittedly, by the testimony of House himself, two signs posted on the said above-mentioned building, referring would-be purchasers in one instance to the agent, Waldron, and in the other to a real estate firm in Valdez." (Emphasis supplied.) Id. at 646-47.

In order to possess something one need not have actual residential occupancy. In Burr v. House, supra, Judge Overfield found that the building on the land, which was standing at the time of Houses's entry, clearly evidenced present possession. In such a situation, abandonment, as a legal term, is properly examined. Our decision is consistent with this approach. Thus, had Orock's cabin been in a state of repair at the time of Flynn's entry, his continued "possession" would have served as a bar to the initiation of rights by Flynn. Because, however, the evidence indicates as Judge Clarke found, that there was no physical evidence evincing a possessory right, the land was properly deemed to have been restored to the status of vacant and unappropriated land.

Appellants urge that Flynn should have the burden of showing that the required use and occupancy was not accomplished. However, on the issue of use, occupancy, and entitlement to the allotment, the adverse parties are not Orock and Flynn, but rather Orock and the Department of the Interior which issued the complaint against Orock's application. 15/ Regardless of Flynn's involvement, the Department could not issue a patent to the heirs of Henry Orock until the requirements of the Native Allotment Act, supra, have been met. As noted by Judge Clarke, the burden of meeting the use and occupancy requirement by clear and credible evidence rests with the Native allotment applicant. In any event, regardless of where the burden of proof is determined to rest, it is clear from our review that Orock's application for the 35-acre parcel must be rejected.

In closing, we wish to make mention of a matter which, while it surfaced briefly at the hearing, was not subject to briefing by either party, viz., the question of how the use and occupancy of Orock on the parcel in conflict with Flynn differed from the use and occupancy of the adjacent 125 acre tract which had been approved for allotment by the State Office decision of March 21, 1977 (see Tr. 19-21). Inasmuch as the State Office granted this part of the allotment, Orock's use and occupancy of this adjacent land was not examined.

15/ In this regard, we would note that the statement of the Regional Solicitor that the Government was merely a "stakeholder" (Tr. 3) was not necessarily accurate. It is possible that the evidence developed at the hearing would show the subject land had been under prior communal use by neighboring Native communities. Had that eventuality transpired, Judge Clarke would have properly rejected both applications.

It is clear, however, that to the extent which we have held that Orock's cessation of use and occupancy vitiated his right of allotment to the land upon which his cabin had formerly been located, the cessation of use of the surrounding land should equally have resulted in the rejection of his application for the 125-acre parcel. While this matter is not part of the instant appeal, the courts have long recognized the continuing authority of the Department to investigate all claims to land until the actual issuance of patent. Schade v. Andrus, Nos. 78-3700, 78-3703 (9th Cir. Feb. 2, 1981). Accordingly, absent the issuance of the patent during the pendency of this appeal, we would normally direct BLM to initiate a contest against the remaining 125-acre tract.

Congress, however, in the Alaska National Interest Lands Conservation Act, December 2, 1980, P.L. 96-487, 94 Stat. 2371, 2435, in essence has provided for approval of all Native allotment applications, which were pending on or before December 18, 1971, in the absence of specified conflicts. See section 905(a)(1). The only conflict of record apparently involves the Flynn application for the 35 acres. Thus, in the absence of any protests from parties identified in section 905(a)(5), the allotment of the remaining 125 acres will be approved as provided for in the Act. Cf. Alyeska Pipeline Co., 52 IBLA 222 (1981).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified for the reasons stated herein.

James L. Burski
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge